NO. 79407-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALEXANDER NAM RIOFTA, APPELLANT

On Review From the Court of Appeals, Division Two
33539-5-II and 33262-1
and
The Honorable James Orlando, Pierce County Superior Court

AMENDED SUPPLEMENTAL BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO REVIEW.

1. Does the post-conviction DNA statute, RCW 10.73.170, by its plain language limit a request for DNA testing to those instances where advances in science permits more accurate or new information than what was available at the time of trial, or may a defendant take a wait and see approach at trial and delay a request for testing until after he is convicted?

2. Even assuming that defendant meets the provisions of RCW 10.73.170 (2)(a)(iii), has the defendant failed to meet his burden of showing that this information is "new" and would establish innocence where the evidence was available for testing at trial and where the presence or absence of defendant's DNA does not establish guilt or innocence?

B. STATEMENT OF THE CASE.

1. Procedure

Petitioner originally petitioned the trial court for post-conviction DNA testing under RCW 10.73.170 (2)(a)(iii). CP 1-41. The superior court denied defendant's request on September 2, 2005, and defendant filed a timely appeal. CP 59-64. Almost simultaneous to this appeal, defendant attempted to gain access to post-conviction DNA testing via a personal restraint petition. The personal restraint petition and direct appeal were consolidated and all of defendant's arguments were rejected in a published opinion by the Court of Appeals. See State v. Riofta, 134 Wn. App. 669, 682, 142 P.3d 193 (2006).

This court accepted review only to determine the parameters of RCW 10.73.170, the post-conviction DNA statute.

2. Facts

Defendant knew victim Ratthana Sok long before defendant walked up to Sok's driveway and shot at him. Sok and the defendant had known each other for years, playing basketball together when they were younger and defendant often frequented his neighborhood. RP 186. Just days before the shooting defendant was seen strolling near Sok's home. RP 190.

Victim Sok also had a familial tie that provided a motive for defendant to use him as a target. Victim Sok's brother, Veasna Sok, was about to testify in open court in a notorious gang shooting case,

the Trang Dai Café case.[1] RP 241. Defendant had been following the Trang Dai case and police later uncovered a photo and news articles depicting all eight Trang Dai defendants in defendant's room. RP 257. Defendant admitted that he knew Trang Dai codefendants Jimmie Chea and Sarun Ngeth. RP 255-56.

It was against this backdrop, that victim Sok and defendant's paths would cross again. On January 27, 2000, the morning of the shooting, Ratthana Sok left his home to walk to school at approximately 6:50 a.m. RP 177. It was dark outside, but there were lights illuminating the area outside of his home, particularly the driveway area in front of the garage. RP 189. As Sok walked out of the garage onto the driveway he noticed a Honda Civic parked in the street next to the driveway. RP 179-80, 188. This same Honda Civic was reported stolen within the last 24 hours by Ali

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[1] On July 5, 1998, five people were shot dead and five more were shot and wounded at the Trang Dai Café in Tacoma, Washington. RP 240. Eight persons, including Veasna Sok, were subsequently arrested and accused of committing what became known as the Tran Dai Massacre. RP 240. Veasna Sok was charged with five counts of aggravated murder and five counts of assault in the first degree. RP 241.

Veasna Sok subsequently entered into a plea agreement with the State that required him to testify against the other Trang Dai defendants. RP 241. Only two of the eight persons charged with committing the Trang Dai murders, Jimmie Chea and John Phet, ultimately went to trial on the charges. After Veasna Sok agreed to testify for the State, Chea and Phet assaulted Veasna Sok in open court. RP 243. Despite the intimidation, Veasna Sok determined to keep his plea agreement with the State. RP 243.

Saleh. RP 265, 287. Saleh further reported that he had a white hat in the car and would later identify a white hat recovered from Sok's driveway as the hat he had left in his car. RP 289.

Sok believed there were two to three people in the car and defendant got out of the front passenger seat and approached Sok. RP 181. Sok saw defendant approach him wearing a white hat. RP 187, 192. Sok immediately recognized the defendant from his prior meetings. RP 182. Defendant had his hands concealed in his pockets and asked Sok for a cigarette. RP 182. Sok responded, "I don't smoke." RP 182. Defendant pulled a chrome revolver out of his pocket. RP 182-183. Two or three feet separated Sok and the defendant. RP 182-83.

Defendant pointed the revolver at Sok's forehead. RP 183-84. Defendant started firing. RP 184. The first shot missed Sok's head. RP 184. Sok turned and ran towards his garage. RP 184. Sok heard a total of four to five shots fired as he ran. RP 185. Sok ran through the garage and into his house. RP 186. Sok's father tried to go outside but Sok told him not to because someone was shooting at him. RP 185-86. Sok and his father told Sok's mother to call the police. RP 186.

Police immediately responded and Sok advised that "Alex" had shot at him. RP 198, 201, 200, 246, 274. Sok did not know Alex's last name. RP 198. Sok described the defendant as 17-18 years old, 5'2" to

5'3", with a moustache and shaved head. RP 204, 200, 246. Sok's description matched the defendant's. RP 258, CP 56.

Police examined the crime scene. RP 216. Police found a bullet hole next to the garage door, and another one over the garage door. RP 216, 245. Police found two bullet holes in a Ford Explorer parked in the garage. RP 216, 245. Police observed that an Acura Legend parked in the garage had also been struck by the bullet. RP 217-18, 245. Police found a spent shell caseing and a white hat in the driveway. RP 191-192, 219. Sok recognized the white hat as the one that the defendant had been wearing. RP 192.

Sok went to the police station with Detective Tom Davidson. RP 198, 247. Davidson asked the police computer to search its photo database for photos of Asian males named "Alex" or "Alexander." RP 247-48. Davidson showed Sok a number of photographs that the computer produced, including a photo of the defendant. RP 198, 248-249. Sok identified the defendant as the person who shot at him. RP 198. Sok told Detective Davidson, "That's him right there. I'm positive." RP 249.

On January 28, 2000, Detective Davidson went to contact defendant at his home, which is approximately six blocks away from the Sok residence. RP 249-50. Detective Davidson told the defendant that he was under arrest for a shooting. RP 250. Defendant angrily responded, "I

didn't shoot no mother fucker yesterday. I was here drinking all night. I worked yesterday from – at the News Tribune from 1:00 to 5:30. I don't even own no gun, how could I shoot some mother fucker." RP 251. The defendant was brought to the police station for an interview. RP 252.

Defendant denied shooting Ratthana Sok. RP 254. He admitted that he knew both Ratthana and Veana Sok and had visited the home on prior occasions. RP 254-56. Defendant told Detective Davidson that "Veasna was a sucker for snitching on the Homeys, and that he deserved to get choked up in court for snitching on [Jimmie Chea]." RP 255.

On January 29, 2000, police recovered a stolen Honda Civic several blocks from the Sok residence.

C. ARGUMENT.

Summary of Argument

The issue presented to this court is the scope and breadth of the post-conviction DNA statute, RCW 10.73.170 (2)(a). The State requests that this court adopt an interpretation that is consistent with the language and intent of the statute: to redress grievances of criminal defendants who were not afforded the type of DNA testing now requested due to scientific limitations at the time of trial. The State asks this court to find that this post-conviction procedure is unavailable to defendant's who choose to forgo DNA testing at trial and take the "wait and see" approach of this petitioner.

The State's argument rests on (1) interpreting the plain language of the post-conviction request statute as a whole, (2) reading the statute to render no provision of the statute meaningless, and (3) examining the legislative history cautiously. The State will also ask this court to find that even if the defendant could meet the procedural hurdles of RCW 10.73.170, he still cannot make a substantive case for testing the white hat at issue. Unlike many other cases involving DNA (e.g. rape or murder) the presence or absence of defendant's DNA on the white hat does not establish guilt or innocence.

With the availability of forensic DNA for cases beginning circa 1985 the question arose in the criminal justice system of how to procedurally allow the testing in old cases where the evidence was there, but the science was not, at the time of trial. See DNA Typing: Emerging or Neglected Issues, 76 Wash. L. Rev. 413, 413-14 (2001)(Provides an overview of early forensic uses of DNA). In 2000, following a national trend, Washington adopted its first post-conviction DNA request statute. Former RCW 10.73.170, Laws of Washington 2000, ch. 92; see also, Berger, The Impact of DNA Exonerations on the Criminal Justice System, 34 J.L.Med. & Ethics 320 (2006)(A survey of state statutes providing for post-conviction DNA testing). In 2005, the legislature amended the post-conviction DNA request statute, RCW 10.73.170, changing the forum in which the petitioner may make the request, and allowing requests to be based on scientific advancements. The statute now directs petitioners to

file a request in the court that entered the judgment of conviction, rather than writing a request to the prosecutor. Compare current RCW 10.73.170(1) with former RCW 10.73.170(1). The statute permits petitioners to petition a court where advancements in DNA allow for new testing that is either more accurate or provides new information than earlier testing. RCW 10.73.170 (iii). It is the interpretation of this section, as well as the statute as a whole, which comes before the court at this time.

This court has the ultimate authority to determine the meaning and purpose of a statute. State v. Hansen, 122 Wn.2d 712; 717, 862 P.2d 117 (1993). The court's function in interpreting a statute is to discover and give effect to the intent of the Legislature. Id., (citing Stewart Carpet Serv., Inc. v. Contractors Bonding & Ins. Co., 105 Wn.2d 353, 358, 715 P.2d 115 (1986). To fulfill the Legislature's intent, statutes must be construed as a whole, and undue emphasis must not be placed on individual sections of a statute. Id. (citing Finley v. Finley, 43 Wn.2d 755, 761, 264 P.2d 246, 42 A.L.R.2d 1379 (1953). "To determine the intent of the Legislature, the court must look first to the language of the statute.'" Service Employees Int'l Union, Local 6 v. Superintendent of Pub. Instruction, 104 Wn.2d 344, 348, 705 P.2d 776 (1985) (quoting Condit v. Lewis Refrigeration Co., 101 Wn.2d 106, 110, 676 P.2d 466 (1984)).

1. THE PLAIN LANGUAGE AND WHOLE STATUTE OF RCW 10.73.170 SHOWS THE INTENT OF THE LEGISLATURE WAS TO PERMIT TESTING OF DNA IN CASES WHERE A DEVELOPMENT IN SCIENCE PERMITS NEW OR MORE ACCURATE INFORMATION THAN WHAT WAS AVAILABLE AT TRIAL.

a. Plain language/whole statute.

When looking to a whole statute analysis, one must first look to where in criminal procedure the DNA request statute falls. The statute comes under Chapter 10.73 "Criminal Appeals." This statute, which once covered appellate procedure for defendants, (*See* RCW 10.73.010, which now refers to Rules of Court for appellate procedure) now deals almost exclusively with post-conviction relief/collateral attacks. Historically, Washington courts have strictly construed post-conviction relief statutes in "light of the legislative intent to control the flow of post-conviction collateral relief petitions and to uphold the principles of finality of litigation." State v. Hurt, 107 Wn. App. 816, 825, 27 P.3d 1276 (2001); Accord In re Pers. Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1, 670, (2004).

Thus when analyzing RCW 10.73.170, this court should refrain from an overly-broad interpretation which would go against the preference to settle evidentiary and culpability issues at the trial setting, rather than in a post-conviction motion.

Beyond the construction of this statute within RCW 10.73, an examination of the statute as a whole easily guides this court to the legislature's intent in drafting this statute, which was to provide relief for those either convicted at a time when no DNA science was available at all, or where science has significantly advanced since trial thus allowing either new information or more accurate information. The statute's text is broken down into three avenues for pursuing DNA testing:

THREE AVENUES FOR PURSUING DNA TESTING	
COURT RULES INADMISSIBLE	(i) The court rules that DNA testing did not meet acceptable scientific standards; or
SCIENTIFICALLY NOT POSSIBLE	(ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or
SCIENCE IS MORE ACCURATE	(iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information;

RCW 10.73.170.

Subsection (2)(a)(i) recognizes that courts were once reluctant to admit nascent DNA analysis, authorizing the use of post-conviction DNA analysis only in those narrow instances in which the defendant requested DNA analysis but the trial court denied that analysis. Subsection (2)(a)(ii) authorizes the use of post-conviction DNA analysis only when DNA analysis during trial was impossible. For example, subsection (ii) deals

with a different scientific issue than subsection (iii), usually in the form of sample size. The last ten years has seen an advance in forensic capability in allowing a very small DNA sample size that previously would have been too small to analyze at all. See State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001) (describing the advance of PCR testing, which allows a small sample to be scientifically photocopied, a process known as amplification, until it is large enough to test). Subsection (2)(a)(iii) recognizes that DNA analysis becomes more accurate over time or can provide new information over time, e.g., more discriminating in the form of the ability to test on more alleles[2] than original testing. This third category, where there is a development in science, is the legislature's answer to meeting the needs of current or even future defendants where leaps in scientific advancements are made that make the "current request" lead to the possibility of more accurate or possible new information not available at trial. In each subsection (i)-(iii), the authorization of post-conviction DNA analysis is coupled with a limitation that prevents the

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[2] DNA calculations are based on the likelihood of a random match of the genetic profile in the human populations, e.g. 1 in 90 million. DNA typing involves testing a certain number of alleles, and determining the "statistical frequency or product of the probabilities of each allele occurring in the population and then multiplying these frequencies by each other to calculate the probability of all of the alleles occurring together." State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001).

convicted person from requesting DNA analysis that she could have requested at trial.

The structure of RCW 10.73.170(2)(a) indicates that the remainder of subsection (2)(a)(iii) ("or would provide significant new information") authorizes post-conviction DNA analysis only when that analysis was unavailable to the convicted person at trial. This reading is consistent with RCW 10.73.170(2)(a)'s pattern of authorizing post-conviction DNA testing only when that type testing was not available at trial. The fact that the phrase "or would provide significant new information" is in the same subsection as the phrase "[t]he DNA testing *now requested* would be significantly more accurate than prior DNA testing" shows that in drafting this provision, the legislature was concerned with advancements in technology and the ability of DNA to provide clues only after the trial has been concluded.

The Legislature's choice to limit this phrase to information that is both "significant [and] new" requires a petitioner to show that the requested information was not available to the convicted person at trial. Id. Potentially exonerating DNA analysis that was available at the convicted person's trial may certainly be significant, but it is not "new" in any sense of the word. Id. Certainly the information may be new in that it was not known until the analysis was performed, but such a reading of the

word "new" would render it meaningless. All DNA analysis yields information that was not known before the analysis was conducted. By specifically including the word "new" in the statute, the Legislature expressed an intent to further define the types of significant DNA analysis that would be admitted, necessarily excluding some post-conviction DNA analysis (2)(a)(iii)

The Court of Appeals below correctly understood the plain meaning of "new information" within the context of the statute and also relied on a whole statute analysis in concluding that the provisions are to be read in light of each other:

> [I]t is clear the legislature did not intend that a convicted person be able to obtain post conviction DNA testing merely by stating that DNA testing would provide significant new information when it is undisputed and the person acknowledges in other pleadings that all information that may result from current testing was available at trial through testing of equal accuracy.

134 Wn.App. at 684.

The Court of Appeals concluded that petitioner could not meet the procedural hurdle under RCW 10.73.170 because he could not show how testing would give "*new information*" given that the science and material was available at trial. Instead, defendant forced a reading of the statute that would permit a "wait and see" position on DNA testing by trying to gain acquittal without the DNA information but, following conviction,

moving to test the DNA." This it concluded would lead to absurd or strained consequences and creates an "illusory procedural burden." 134 Wn. App. at 683, 684.

The problem with petitioner's claim is that he has never proffered to any court that a change in science makes testing possible that was not possible before, or a change in science leads to new or better information than what was available at the time of trial. Reframing defendant's argument shows it falls short of the intent of the legislature in drafting this statute and instead turns his request into a garden variety request for retesting of evidence available at trial. At the heart of defendant's argument is that his counsel was ineffective for failing to seek testing of the DNA evidence. RCW 10.73.170 was not drafted with the intent to redress tactical errors or strategies. Defendant could, and did in this case, pursue an ineffective assistance of counsel claim for failing to request a test of the white hat.[3] If defendant cannot establish that counsel was ineffective for failing to pursue a line of defense or testing at trial, then in this particular case the analysis must end.

b. Construing the statute to render no provision meaningless.

Defendant complains that the Court of Appeals grafted language into the statute by holding that RCW 10.73.170 (2)(a)(ii) must state that

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[3] Defendant did not petition this court, and this court did not accept review, on the ineffective assistance of counsel claim.

the testing '"would provide significant new information"' *unavailable at trial*." 134 Wn. App. at 684 (emphasis supplied). Defendant mischaracterizes the court's holding. The court did not graft language, but rather explained the obvious textual implication of certain phrases already within the statute. For example, the beginning of subsection (iii) requires a showing that the "DNA testing *now requested* . . .(.)" Defendant ignores this provision entirely, and by doing so his proposed interpretation renders this provision of subsection (iii) entirely meaningless. See City of Seattle v. Dep't of Labor & Indus., 136 Wn.2d 693, 698, 965 P.2d 619 (1998) (recognizing courts must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous). "Now requested," suggests that there was either a previous request or test that was less accurate or would have provided different information than the *new information* now sought.

The State maintained below and still maintains that the entire statute is limited to where DNA was tested below, or a request was made. Otherwise, how would one establish that it is "new information" at all if no old information exists with which to compare.[4] Defendant relies on the last antecedent rule to support his claim that the phrase "than prior DNA testing" only modifies the phrase "would be significantly more accurate,"

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[4] The Court of Appeals disregarded this portion of the State's argument below, finding that the last antecedent rule prevented such an analysis. See Argument *Infra* regarding the last antecedent rule.

and not the phrase "would provide significant new information." However, the last antecedent rule is not the rigid rule that petitioner makes it out to be:

> "The [last antecedent] rule is another aid to discovery of intent or meaning and is not inflexible and uniformly binding. Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent."

State v. McGee, 122 Wn.2d 783, 788, 864 P.2d 912 (1993) (quoting, 2A N. Singer, Statutory Construction § 47.33, at 270 (5th ed. 1992)). As outlined *supra* the text of the entire statute, as well as the use of the phrase "now requested" in subsection (iii) requires an interpretation that limits requests to those where previous requests were made.

Defendant also proffers that the Court of Appeals' interpretation construes the post-conviction statute in a matter that needlessly replicates existing remedies. (See Petition for Review at 12, citing CrR 7.5(a)(3); RAP 16.4 (c)(3)). Defendant overlooks that RCW 10.73.170 requires that the motion also must meet the "procedural requirements established by court rule." RCW 10.73.170 (2)(c). Even assuming defendant could meet the requirements of the post-conviction statute, he cannot meet the procedural requirements under CrR 7.8. RCW 10.73.170 does not address what happens after the defendant has DNA tested; instead that procedural mechanism falls under CrR 7.8. Like RCW 10.73.170 (2)(iii), CrR 7.8 (b)(2) requires a showing of "*newly* discovered evidence." Although CrR

7.8 does not state, "newly discovered evidence *since trial*," (the apparent same fatal flaw that defendant argues the Court of Appeals decision suffers from), this provision has always been construed to be limited to those situations where evidence has surfaced since trial. To obtain a new trial based upon newly discovered evidence, a defendant must prove that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996). Similarly under RAP 16.4, an "appellate court will grant appropriate relief to a petitioner" if "material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding." The standard applied under RAP 16.4(c)(3) for a new sentencing proceeding is the same as that applied to a motion for new trial based upon newly discovered evidence. In Re Brown, 143 Wn.2d 431, 21 P.3d 687 (2001). Defendant cannot meet the procedural requirements of either CrR 7.8 or RAP 16.4 under the construction he urges this court to make because the DNA evidence would not constitute newly discovered evidence.

c. Legislative history.

The State maintains that the plain text of the statute supports the interpretation reached below. However, because petitioner relies in part

on legislative history for his case, the State feels compelled to bring to this court's attention that the legislative history supports the opposite conclusion and highlights that the intent was to address problems in science and not alleged problems in trial tactics. The testimony of the sponsors of SHB 1014 indicates that the Washington Legislature's primary intent in enacting RCW 10.73.170(2)(a) was to allow convicted persons to utilize DNA analysis technology that was not available to them during trial.

> The statements of the sponsors of a bill are expected to be particularly well informed about [the bill's] purpose, meaning, and intended effect. In recognition of this reality of legislative practice, courts give consideration to statements made by a bill's sponsor on grounds similar to those relied on to support the use of statements by the committeeman in charge of the bill.

Marine Power & Equipment v. Washington State Human Rights Commission Hearing Tribunal, 39 Wn. App. 609, 619, 694 P.2d 697 (1985); see also State v. Heiskell, 129 Wn.2d 113, 119, 916 P.2d 366 (1996) (bill sponsor's colloquy used to infer legislative intent). When ascertaining the Legislature's intent in passing a bill, courts will generally not consider the testimony of people who are not legislators. See Louisiana-Pacific Corp. v. Asarco Inc., 131 Wn.2d 587, 934 P.2d 685, (1997) (statements of unidentified member of the House Staff during committee hearing could not provide insight into the legislative intent of the bill). The testimony of the sponsors of Substitute House Bill 1014

("SHB 1014") shows that the Legislature passed SHB 1014 intending to give convicted persons access to DNA analysis only in those cases in which they could not have offered that analysis at trial.

i. The statements of the sponsors of SHB 1014 indicate that the bill was intended to authorize post-conviction DNA analysis that was unavailable at trial.

Representatives Darneille and O'Brien were among the sponsors of SHB 1014. During the 2005 Legislative Session, Representatives Darneille, O'Brien, Cody, Morrell, Chase, and Schual-Berke sponsored House Bill 1014 ("HB 1014"). Summary of HB 1014. HB 1014 proposed to resurrect RCW 10.73.170, which had expired during the previous Legislative Session. HB 1014, 59th Leg. (Wa. 2005); Laws of Washington 2003, ch. 100. The House passed HB 1014, whereupon the Senate passed SHB 1014, creating, *inter alia*, the present form of RCW 10.73.170(2)(a). SHB 1014, 59th Leg. (Wa. 2005). When SHB 1014 returned to the House floor for third reading, Representative Darneille told the House that the Senate merely improved HB 1014 by "changing ...the placement of a section, and nothing more dastardly than that was done to our good little bill." House Floor Debate of February 28, 2005. The Final Bill Report on SHB 1014 lists Representatives Darneille and O'Brien among the original sponsors of the SHB 1014. HB Rep. 1014 (Wa. 2005).

The testimony of these two representatives indicates that the Legislature passed SHB 1014 to give convicted persons access to DNA analysis only in those cases in which it was impossible to admit such evidence at trial. In support of the Senate's amendments, Representative O'Brien told the House that SHB 1014:

> Requires...the [convicted] person [to] explain to the court that the DNA technology was not sufficient at the time of the prior test or that, with the new technology available in DNA recovery,...significantly more accurate tests can be made available for exoneration purposes."

House Floor Debate of February 28, 2005. When representative Darneille spoke in favor of passing the amended bill, she did not contradict Representative O'Brien's statement. Id. Representative O'Brien's statement reveals that SHB 1014 was primarily concerned with the effect of advancements in DNA technology which could benefit current defendants, but were unavailable to defendant's in previous trials. Id. SHB 1014 was designed to provide analysis that was not available during a convicted person's trial. Defendant's reading of the statute asks this Court to conclude that the Legislature intended to go farther and create a right to DNA analysis for convicted persons who failed to request DNA analysis that was available to them at trial. Neither representative said that he or she wanted defendants to be able to forgo DNA analysis at trial, wait for the outcome of the trial, and then challenge an unfavorable verdict

with evidence that was available to them at the trial. House Floor Debate of February 28, 2005.

ii. Statements made by non-legislators should not be used to ascertain the legislative intent of SHB 1014.

In support of his reading of RCW 10.73.170, defendant cites testimony before the House Committee on Criminal Justice and Corrections. Br. of Appellant at 15-16. This testimony included statements from members of the Washington State Office of Public Defense, the Innocence Project, the Washington Association of Criminal Defense Lawyers, the Washington Defenders Association, the Washington Association of Prosecuting Attorneys, the King County Prosecuting Attorney's Office, and the Director of the Washington State Patrol Forensics Lab. Br. of Appellant at 15, n. 9. None of this testimony came from state legislators, but rather from interested third parties.

The testimony defendant cites does not provide any insight into the intent of the Legislature. At best, this testimony elucidates some of the facts before the committee who recommended that the legislature pass the bill. Just as the testimony of witnesses at trial might be helpful in determining which facts were before a trial judge but do not explain the judge's reasoning, the testimony of interested parties in a committee hearing explains some of the facts before that committee but not the rationale of the legislators who eventually passed the bill. See Louisiana-

Pacific Corp., 131 Wn.2d 587.

iii. Even if this Court considers the testimony of non-legislators, the statements defendant cites do not support defendant's claim that SHB 1014 authorizes defendants to perform post-conviction DNA analysis that was available to them at trial.

The testimony that defendant cites does not provide insight into the Legislative intent of current RCW 10.73.170. First, the testimony defendant cites does not pertain to the form of the bill that created RCW 10.73.170(2)(a)(iii). Defendant cites testimony from the 2004 legislative session and from House Committee hearings on HB 1014. The bills about which these people were testifying merely reenacted the language from the previous form of RCW 10.73.170, which did not include the current structure or language of RCW 10.73.170. HB 1014, 59th Leg. (Wa. 2005); Laws of Washington 2003, ch. 100. The current version of RCW 10.73.170 was created by SHB 1014, which was passed by the Senate and then concurred in and passed by the House. Summary of HB 1014. Representatives Darneille and O'Brien made the only relevant statements made after this amendment was introduced in the Senate. House Floor Debate of February 28, 2005. As noted above, these representatives' statements stand for the proposition that RCW 10.73.170 was intended to provide post-conviction DNA analysis only when that analysis was not

available at trial.

Second, the statements that defendant cites do not support the proposition that RCW 10.73.170 was intended to provide convicted persons unfettered access to post-conviction DNA analysis. Defendant cites Dan Satterberg of the King County Prosecutor's Office, who testified when the House Committee on Criminal Justice and Corrections as follows:

> the Association of Prosecuting Attorneys strongly endorse this bill and urge your quick action on it. It is consistent with our mission as prosecutors, which is not to win convictions but to seek justice...I can say that there's nothing more gratifying for a police officer or a prosecutor to be able to go back to a case that we thought we couldn't solve and bring it to justice. But we have an equal obligation to use DNA to seek the truth, even when the truth reveals that we've made a mistake. And we do make mistakes because we're human...We think that every inmate convicted of a crime involving forensic evidence deserves that ability to come back and have it tested *using today's technology.*

Revising the DNA Statute: Hearing before the House Criminal Justice Committee, 59th Legislative Session 16:28 (2005) (recording available at http://www.tvw.org/media/mediaplayer.cfm (emphasis added). Mr. Satterberg made a similar statement when he testified before Senate Human Services and Corrections Committee on January 18, 2005.

Revising the DNA Statute: Hearing before the Senate Human Services and Corrections Committee, 59th Legislative Session 39:30, 59:20 (2005) (recording available at http://www.tvw.org/media/mediaplayer.cfm. During that testimony, Mr. Satterberg emphasized that DNA analysis should be available in those cases in which a sample is taken, a person is convicted, and then "the science may have caught up with the evidence" to provide a new sample that was not available at the original trial. Id. In each instance Mr. Satterberg's testimony in favor of RCW 10.73.170 is conditioned on an understanding that the analysis will be performed to provide evidence that was not available during trial.

Defendant also cites King County Superior Court Judge George Finkle and Senator Val Stevens, who spoke in favor of the bill during the 2004 Legislative session. Judge Finkle stated that "none of us wants an innocent person kept in prison anymore than we want a guilty person to go free or to escape justice." Br. of Appellant at 16.[5] Senator Stevens said that even worse than "having a person serve a sentence that they did not deserve is to imagine that the real perpetrator is going free. And how can we go after the real perpetrator if we think we've already got him?" Br. of Appellant at 16. Certainly these statements support the bill's general goal

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[5] The State could not locate any online recordings of this committee testimony. Appellant claims that these recordings are available through the Secretary of the Washington Senate. This analysis assumes *arguendo* that appellant's quotations are accurate because appellant has accurately cited such hearings in other parts of his brief.

of providing post-conviction DNA analysis to convicted persons. They do not indicate one way or the other, however, what the boundaries of that analysis should be. The criminal justice system requires some sense of finality, and abhors relitigation *ad infinitim*, so there must be some limit to the extent of DNA testing that RCW 10.73.170 authorizes. See Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Judge Finkle's and Senator Stevens's statements at the 2004 Legislative Session do not even broach the subject of the boundaries of the bill; they argue that post-conviction DNA analysis should be authorized, but do not say when or to what extent.

2. DEFENDANT'S CLAIM ALSO FAILS SUBSTANTIVELY AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING HIS POST-CONVICTION DNA REQUEST WHERE THE INFORMATION SOUGHT IS NOT NEW AND WOULD NOT ESTABLISH INNOCENCE.

Defendant's argument also fails on substantive grounds. Assuming *arguendo* defendant passes the procedural bar, he still cannot

establish "the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170 (3).

For the substantive portion of RCW 10.73.170 (3), this court must conduct review under an abuse of discretion standard. A decision of whether to grant or deny a motion under RCW 10.73.170 should be reviewed for an abuse of discretion, just as other motions falling under Title 10.73 are reviewed. See, State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996)(a trial court's decision under CrR 7.8 and RCW 10.73.090 is reviewable for abuse of discretion).

A trial court, unlike an appellate court, is in a better position to analyze whether new evidence or the possibility of obtaining DNA would affect the outcome of a case when it is the tribunal that heard the original evidence and case. In fact, the statute requires the motion to come before the court that entered the judgment and sentence, as occurred in the case at bar. RCW 10.73.170(1). Here, the court's careful analysis and consideration is worth repeating here:

> I think Mr. Riofta was one of the more difficult cases to find that his version was credible, given the facts in the matter, the statement that he made to law enforcement, the evidence that was recovered in his house, the fact that the victim did know Mr. Riofta previously; that Mr. Riofta had been at his house prior to that.
>
> I think it's – in terms of identification, I think there was a lot at risk for the victim in this case. He had been shot at once. His brother was in the process of being involved in the Trang Dai aftermath as well, and he was not someone that was running to court to tell his version of what

> occurred. And the jury found him to be very credible, believed his version of it.
>
> The fact that there was a hat that may contain some DNA of someone other than Mr. Riofta doesn't put the hat at the scene of the – necessarily at the scene of the shooting in this case.
>
> I don't believe that there is a likelihood that this is the type of evidence that DNA testing would properly demonstrate innocence of Mr. Riofta on a more-probable-than-not basis, so I will deny the motion.

RP 14-15.

The court was able to consider the request in light of the case presented and concluded that this evidence was unlikely to establish innocence. The court saw that unlike many rape or murder cases where the presence or absence of DNA may be the smoking gun in the case, the white hat at issue here does not establish Sok's innocence. Instead, potential DNA evidence in this case may be likened to fingerprint evidence. "Fingerprints by their very nature are probative only of the presence of someone; their absence does not prove the absence of that individual." State v. Bernhardt, 20 Wn. App. 244, 247, 579 P.2d 1344 (1978). The facts show that defendant wore the hat on his shaved head at the time of the shooting. The hat belonged to the owner of the stolen vehicle and not to the defendant. Instead of being the possible missing link that defendant wants this to be, this was a hat worn by at least two persons, and has since been admitted at a trial and handled by witnesses, attorneys and possibly jurors. Unlike semen in a rape case, the presence

of someone else's DNA, and the absence of defendant's DNA, does nothing to establish innocence on even a more probable than not basis.

D. CONCLUSION.

Defendant had an opportunity to test the possible DNA evidence in this case at trial with the same forensic capability available today. After having lost at trial, defendant cannot successfully petition under RCW 10.73.170 to test evidence that was available at the time of trial. The legislature's express intent was to provide a procedural mechanism for defendants to reexamine evidence when leaps in science make for better, more accurate or new information that was not otherwise available at trial. Because defendant does not fall within this specific procedural window, this Court must honor the finality of his conviction and deny the request.

DATED: October 5, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

FILED AS ATTACHMENT TO E-MAIL

MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Certificate of Service:
The undersigned certifies that on this day she delivered by US mail ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.5.07 _____
Date Signature